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IN THE

Supreme Court of the United States

October Term, 1947

No. 483

MARGARET GATELY,
Petitioner,

vs.

EDITH HARITON, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF. ALSO MOTION TO DISPENSE WITH THE PRINTING OF THE RECORD.

JAMES P. BURNS,
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Washington 5, D. C.
Attorney for Petitioner

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Supreme Court of the United States

October Term, 1947

No. .....

MARGARET GATELY,
Petitioner,

vs.

EDITH HARITON, ET AL.,
Respondents.

MOTION FOR LEAVE TO DISPENSE WITH THE PRINTING OF THE RECORD OF PROCEEDINGS

Comes now the petitioner, Margaret Gately, by her attorney, James P. Burns, and respectfully moves this Honorable Court for leave to dispense with the printing of the Record of Proceedings in the District Court of the United States for the District of Columbia and the Record of Proceedings in the United States Court of Appeals for

the District of Columbia, in connection with the petition for a Writ of Certiorari filed herein, and as reasons for the same submits the following:

1. That said records by reason of their length would entail a considerable amount of printing.

2. That the cost of said printing would impose upon your petitioner quite a financial burden.

WHEREFORE, the premises considered, your petitioner prays that this Honorable Court dispense with the printing of the Records of Proceedings in the lower courts in this cause, and consider the original transcripts of records on file with this Court as a part of the proceedings in this cause.

Respectfully submitted,

JAMES P. BURNS,
725 15th Street, N. W.,
Washington 5, D. C.
Attorney for Petitioner

IN THE

Supreme Court of the United States

October Term, 1947

No. .....

MARGARET GATELY,
Petitioner,

vs.

EDITH HARITON, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Margaret Gately, (hereinafter sometimes called the appellant) prays that a Writ of Certiorari issue to review the proceedings in the United States Court of

Appeals for the District of Columbia, wherein said court entered the following orders and memorandum:

(a) Order granting motion to dismiss the appeal, and denying motion to fix supersedeas bond and stay proceedings in the lower court, dated June 24, 1947.

(b) Memorandum denying supersedeas bond and a stay of proceedings in the lower court, dated July 25, 1947.

(c) Order denying petition for a rehearing on the motion to dismiss the appeal, dated September 25, 1947.

STATEMENT OF MATTERS INVOLVED

This involves the dismissal of an appeal from a final decree of the District Court of the United States for the District of Columbia to the United States Court of Appeals for the District of Columbia. It also involves the interpretation of certain of the Federal Rules of Civil Procedure, and decisions of this Court.

JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended, 28 U. S. C. 347 (a).

QUESTIONS PRESENTED

1. The Court of Appeals erred in summarily dismissing the appeal, thereby denying the appellant the right to be heard on the merits.

2. The Court of Appeals erred in denying the appellant a supersedeas bond and a stay of proceedings in the lower court pending a determination of the questions and issues involved in said appeal.

REASONS FOR ALLOWANCE OF WRIT

The petitioner submits the following reasons for the allowance of a Writ of Certiorari to review the proceedings in the United States Court of Appeals for the District of Columbia.

1. That the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

2. That the Court of Appeals in departing from the accepted and usual course of judicial proceedings has failed to consider applicable decisions of this court and also applicable Federal Rules of Civil Procedure.

3. That the Court of Appeals has failed to give proper effect to a decision of this court and to certain of the Federal Rules of Civil Procedure.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia, and submits her brief herewith in support of this petition.

Respectfully submitted,

JAMES P. BURNS,

725 15th Street, N. W.,
Washington 5, D. C.

Attorney for Petitioner,

IN THE

Supreme Court of the United States

October Term, 1947

No. .....

MARGARET GATELY,
Petitioner,

vs.

EDITH HARITON, ET AL.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ORDERS AND MEMORANDUM OF THE COURT BELOW

The orders and memorandum of the United States Court of Appeals for the District of Columbia appear on pages

13, 43 and 44 of the Record of Proceedings of the United States Court of Appeals for the District of Columbia, and were entered on the following dates: June 24 ,1947; July 25, 1947; and September 25, 1947.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935, U. S. C. A. Title 28, Section 347 (a).

STATEMENT OF CASE

This action was instituted in the District Court of the United States for the District of Columbia by the appellant, Margaret Gately, against the appellees, Edith Hariton and Grattis H. Parrish, and asked for a dissolution of the partnership operating the Parrot Restaurant, 1701 20th Street, N. W., Washington, D. C., an accounting of partnership profits, and the appointment of a receiver (Dist. Ct. R. p. 1). During the course of the proceedings in the lower court Edith Hariton, one of the original appellees, and Jefferson L. Ford, Jr., not a party to the original action, filed an intervening petition asking that the court vest the leasehold interest in the partnership in them in accordance with the provisions of a clause in the partnership agreement (Dist. Ct. R. 14). The appellant in answer to said intervening petition claimed that the intervenors were estopped from asserting any right to said leasehold by reason of their actions and conduct toward her, and prayed that the said leasehold be vested in the partners, and therefore remain a partnership asset (Dist. Ct. R. 18, 19; 105 to 108). In support of this contention the appellant proffered evidence consisting of the testimony of the appellant and documentary proof, which evidence was rejected by the lower court (Dist Ct. R. 63 to 82). The appellant

offered as evidence a letter directed to her by Grattis H. Parrish, as agent of Jefferson L. Ford, Jr., which letter formed the keystone of the appellant's defense of equitable estoppel. This letter was denied admission by the trial court. Other evidence in support of the defense was introduced by the appellant and rejected by the court, which in the interest of brevity your petitioner deems it expedient to omit in this brief but respectfully directs this court's attention to pages 18 to 26 inclusive of the Record of Proceedings in the United States Court of Appeals for the District of Columbia.

The owners of the fee in the property wherein the partnership was operated and lessors to the partnership, Fanny M. Curtis and Jennie A. Murchinson, were not made parties to the action by the intervenors and were not present at the hearing of the cause in the lower court, although appellant contended that they were necessary parties to the action (Dist. Ct. R. 50). The lower court, on the 12th day of February, 1947, entered a final decree dissolving the partnership, ordered an accounting of partnership profits, and appointed a receiver to operate the business, and as a part of the said final decree held the leasehold not to be a partnership asset and vested the same in Edith Hariton and Jefferson L. Ford, Jr., the intervenors (Dist. Ct. R. 113).

From that portion of the final decree vesting the leasehold the appellant appealed to the United States Court of Appeals for the District of Columbia and filed a Notice of Appeal in the District Court of the United States for the District of Columbia, on the 20th day of February, 1947 (Dist. Ct. R. 117). The appeal was docketed in the United States Court of Appeals for the District of Columbia on the 30th day of April, 1947, and appellees, on the 17th day of May, 1947, and during the period of time allowed the appellant for the filing of her brief, filed a motion to dismiss the appeal on the grounds that the same

was frivolous, but did not cite any case law or rule of court to substantiate their motion (Ct. App. R. 4). The appellant filed an opposition to said motion to dismiss, stating that she would apprise the court of the merits of the appeal and the errors relied upon in her brief to be filed within the time allowed by the rules of said court (Ct. App. R. 10). The court granted the motion to dismiss the appeal and entered an order dismissing the same on the 24th day of June, 1947 (Ct. App. R. 13). Thereafter, and in accordance with the rules of said Court of Appeals, the appellant filed a petition for a rehearing on the motion to dismiss the appeal and set forth therein the errors relied upon, argument, case law, and rules of court in support of the same, and prayed that the case be reinstated and that the appeal be heard on its merits (Ct. App. R. 14). This petition for a rehearing was denied by the Court of Appeals on the 25th day of September, 1947 (Ct. App. R. 44).

The appellant, in accordance with rule 73 (d) and (e) of The Federal Rules of Civil Procedure, petitioned the Court of Appeals to fix the amount of a supersedeas bond and to stay the proceedings in the lower court pending the appeal (Ct. App. R. 1 and 11). The Court of Appeals, on the 24th day of June, 1947, denied the petition to fix the amount of a supersedeas bond and to stay the proceedings in the lower court (Ct. App. R. 13).

In accordance with rule 14 of the Rules of the United States Court of Appeals for the District of Columbia and rule 62 (g) of the Federal Rules of Civil Procedure, application to fix the amount of a supersedeas bond and to stay the proceedings in the lower court was made to a justice of the said Court of Appeals subsequent to the time the court denied the petition to fix the amount of a supersedeas bond and to stay the proceedings in the lower court, but during the period of time the Court of Appeals was con-

sidering the petition for a rehearing and had stayed the issuance of its mandate of dismissal to the District Court of the United States for the District of Columbia. This application was also denied (Ct. App. R. 43).

PART I

The Court of Appeals Erred in Summarily Dismissing the Appeal, thereby denying the Appellant the Right to Be Heard on the Merits.

(a)

This was an appeal from a final decree of the District Court of the United States for the District of Columbia. The right of appeal being conferred by acts of Congress of February 9, 1893, 27 Stat. 435 Ch. 74, sec. 7; March 3, 1901, 31 Stat. 1225 Ch. 854 sec. 226; March 3, 1921, 41 Stat. 1312 Ch. 125 sec. 12, as follows:

> "Any party aggrieved by any final order, judgment, or decree of the District Court of the United States for the District of Columbia, or of any justice thereof, may appeal therefrom to the said United States Court of Appeals for the District of Columbia; *and upon such appeal the United States Court of Appeals for the District of Columbia shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just,* except as provided in the following sections. Appeals shall also be allowed to the United States Court of Appeals for the District of Columbia from all interlocutory orders of the District Court of the United States for the District of Columbia, or any justice thereof, whereby the possession of property is changed or affected, such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like; and also from any other interlocutory order, in the discretion of the said United States Court of Appeals for the District of Columbia, whenever it is made to appear

to said court upon petition that it will be in the interest of justice to allow such appeal".

In view of the fact that this was an appeal from a final decree it was given as a matter of right and in accordance with the express provisions of the statute creating the right it was mandatory upon the said Court of Appeals to "Review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just . . .". The Court of Appeals did not review the decree appealed from, nor did said Court affirm, reverse, or modify said decree.

At this point it would be well to consider the case of *Ex Parte Jordan*, 94 U. S. 248, in which the Circuit Court of the United States for the Southern District of New York entered a final decree in the cause but denied aggrieved parties the right to an appeal therefrom. Upon application to this court for a Writ of Mandamus to compel the allowance of an appeal from its decision this court granted the Writ of Mandamus, and in so doing Mr. Chief Justice Waite said:

> "We think that an appeal should have been allowed in this case. The petitioners were defendants in the suit when the final decree was rendered. They were directly interested in what was then decided. *The allowance of an appeal under sec. 692 Rev. Stat. follows of course, if prayed for by one who has the right to it. The language of the statute is 'SHALL BE ALLOWED' which means 'MUST BE ALLOWED' when asked for by one who stands in such relation to the cause that he can demand it.* The question upon such an application is not what will be gained by an appeal, but whether the party asking it can appeal at all".

It is the basic and fundamental theory of our American system of jurisprudence that where the legislature has conferred upon an aggrieved litigant the right of an appeal, such litigant shall be granted the privilege of presenting in orderly fashion to a legally constituted judicial tribunal

the facts and circumstances which constitute the aggrievement together with judicial decisions, legislative acts, and rules of court, in support of his contention. The well accepted and orthodox means of carrying out such a theory of jurisprudence lies in the right of the aggrieved party to file a written brief, setting forth his case in logical form and supported by case law, and also to be afforded the opportunity of apprising the court further by way of oral argument. These principles are fully set forth in the rules of the United States Court of Appeals for the District of Columbia. In accordance with rule 12 (d) and rule 17 par. 6 of subdiv. C of the rules of said court of appeals the errors relied upon by the appellant were to be incorporated in her brief, so, therefore, in dismissing the appeal during the period of time allowed the appellant for filing her brief we find said court dismissing an appeal without having before it the errors of the lower court upon which appellant intended to rely.

In petitioning this court for a writ of error in the year 1861 the petitioner was not required to specify upon the record the errors he complained of, and the same practice prevails in appealing from a final decree of the District Court of the United States for the District of Columbia to the United States Court of Appeals for the District of Columbia at the present time. This court in the case of *Hecker vs. Fowler,* 66 U. S. 95, in the year 1861, denied a motion to dismiss a writ of error from the Circuit Court of the Southern District of New York, and Mr. Chief Justice Taney in that opinion said:

> "We are asked to dismiss this writ because no error appears on the face of the record. It is not necessary by the practice of this court, for the party who brings a cause here to specify upon the record the errors he complains of, and they are not even informally brought to our notice until the argument is heard. *Want of Jurisdiction and irregularity of the writ are the only grounds of dismissal.* Where a judgment appears to

have been rendered which the party is entitled to have revised in this court, and it is also seen that it comes here for such revision upon proper process, duly issued, all other questions must await the final hearing. To say that there is no error in this judgment, and affirm it for that reason, would be to decide the whole legal merits of the case, and this we cannot do on a motion to dismiss or quash the writ".

This court in the case of the *Steamship Douro vs. United States*, 3 Wall 564, 70 U. S. 564, in the year 1866, held that an appeal is a matter of right and Mr. Chief Justice Chase in delivering the opinion of the court in that case said:

> . . . "We cannot approve the conduct of the counsel who advised this appeal. *An appeal is a matter of right, and, if prayed, must be allowed;* but should never be prayed without some expectation of reversal. We impose penalties when writs of error merely for delay are sued out, in cases of judgments at law for damages; and if the rule were applicable to the case before us, we should apply it."

These same principles of law were further enunciated by this court in the case of *Amory vs. Amory*, 91 U. S. 356, in the year 1875, in which a motion to dismiss an appeal from the Supreme Court of the state of New York on the grounds of frivolity was denied, and in denying the motion Mr. Chief Justice Waite delivered the opinion of the court, which by reason of its brevity and explicitness your petitioner sets forth in toto, as follows:

> "We cannot dismiss a case on motion simply because we may be of the opinion that it has been brought here for delay only. *Both parties have the right to be heard on the merits;* and one party cannot require the other to come to such a hearing upon a mere motion to dismiss. To dismiss under such circumstances would be to decide that the case had no merits. Neither can we advance a cause for argument for the reason that we may think it has no merits. Further argument may show the contrary.

> We can adjudge damages, under section 1010 Rev. Stat. and rule 23, in all cases where it appears that a writ of error has been sued out merely for delay. *This gives us the only power we have to prevent frivolous appeals and writs of error;* and we deem it not improper to say that this power will be exercised without hesitation in all cases where we find that our jurisdiction has been invoked merely to gain time".

The vigilance of this court in protecting the right of a party to a hearing on the merits is further emphasized in the case of *Taylor vs. Leesnitzer,* 220 U. S. 90, decided in 1911, which was an appeal from the Supreme Court of the District of Columbia to the Court of Appeals for the District of Columbia. The Court of Appeals dismissed the appeal on motion of appellees on the grounds that the bond filed by the appellant was not in proper form. The appellant appealed to this Court from said dismissal and in reversing the decree of dismissal, Mr. Justice Holmes, speaking for the Court, said:

> "We generally are slow to overrule the decisions of courts other than courts of the United States upon matters of local practice. *But as the court of appeals unwillingly yielded a consideration of the merits to what in the circumstances was little more than form, we feel less hesitation than otherwise we might in acting upon our opinion that it took too strict a view of its own powers".*

The right to a full and complete hearing on the merits forms the cornerstone of our system of jurisprudence, and judicial decisions and rules of court seek to forever protect and preserve that right, as evidenced by the aforementioned decisions of this court.

The appellant is not here contending that an appellate court is bound to hear an appeal upon its merits in all cases and is without the power to dismiss an appeal; but the appellant vigorously contends that an appellate court does not have the power to dismiss an appeal on the

grounds of frivolity, where the legislature has granted the privilege of an appeal as a matter of right and the appellant has conformed with all the rules of the lower court and the appellate court in perfecting that appeal.

(b)

Relative to the contention of the appellant in the trial court that Fanny M. Curtis and Jennie A. Murchinson were necessary parties to the action it would be well to review the subject of joinder of parties to actions, and such review will inevitably lead to the often quoted case of *Shields vs. Barrow*, 17 How 130, 15 L. Ed. 158, 161, 58 U. S. 130. The opinion in that case pointed out three classes of parties to a bill in equity, as follows:

> "1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties: but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties; 3. Persons who do not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience".

In the case of *Minnesota vs. Northern Securities Company*, 184 U. S. 199, 255, 22 S. Ct. 308, 322, 46 L. Ed. 499, this court cited the cases of *Shields vs. Barrow*, 58 U. S. 130; *Hipp v. Babin*, 19 How 271, 276; and *Parker vs. Winnipisogee Cotton and Woolen Co.*, 2 Black 545, as authority for the following practice in Courts of Equity:

. . . "The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasons and may be enforced by the court, sua sponte, though not raised by the pleadings or suggested by the counsel".

Story's Equity Pleading, section 72, was also quoted in the *Minnesota vs. Northern Securities Co.* case, as follows:

"The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject matter of the suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done either to the parties before it or to others that are interested in the subject matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto".

The aforementioned opinions of this court on the subject of necessary parties to actions have been incorporated in rule 19 (b) of the Federal Rules of Civil Procedure, promulgated by this court pursuant to the Act of Congress of June 19, 1934, as follows:

"When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, *THE COURT SHALL SUMMONS THEM TO APPEAR IN THE ACTION.* The court in its discretion may proceed in the action

> without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent parties".

Rule 19 (b) of the Federal Rules of Civil Procedure states that the court *SHALL* order necessary parties summoned to appear in the action. The language of the rule leaves no other interpretation than that the court *MUST* summon necessary parties to appear in the action. Fanny M. Curtis and Jennie A. Murchinson were the owners of the real estate involved in this action and they expressly provided that the lease could not be assigned without their written consent (Dist. Ct. R. 92). The record in this case will not reveal one scintilla of evidence that said parties had any knowledge whatsoever of the proceedings in the District Court of the United States for the District of Columbia which had to do with the disposition of said leasehold.

The joinder of said parties could have been made without their consent or voluntary appearance and such joinder would not have deprived the court of jurisdiction of the parties before it. Said parties could have been summoned to appear in the action and if said summons was returned "not to be found" they could have been brought before the court constructively through service by publication in accordance with the provisions of Title 13, Sec. 108 of the District of Columbia Code (1940 Ed.).

Therefore, it is respectfully submitted, that the United States Court of Appeals for the District of Columbia in dismissing the appeal in this case failed to consider Rule 19 (b) of the Federal Rules of Civil Procedure, and controlling decisions of this court on the subject of the joinder of necessary parties to action.

(c)

Relative to the alleged error of the trial court in rejecting evidence proffered by the appellant this court in the case of *Buckstaff vs. Russell,* 151 U. S. 626, 14 S. Ct. 448, 38 L. Ed. 292, said:

> "If the question is in proper form and clearly admits of an answer favorable to the party on whose side the witness is called, it will be error to exclude it".

Therefore, it is respectfully submitted, that the United States Court of Appeals for the District of Columbia, in refusing to hear this appeal on its merits sanctioned the action of the trial court in denying the admission of relevant evidence favorable to the appellant, which action by the trial court constituted reversable error; and that the said Court of Appeals in so acting failed to consider an applicable decision of this court.

PART II

The Court of Appeals Erred in Denying the Appellant a Supersedeas Bond and a Stay of Proceedings in the Lower Court Pending a Determination of the Questions and Issues Involved in Said Appeal.

This court in the case of *Goddard vs. Ordway,* 94 U. S. 672, set forth with clarity and unmistakable directness the right of an appellant to have the proceedings in the lower court stayed during the pendancy of an appeal, this court saying:

> "A supersedeas is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the act of Congress in that behalf. We are not required, therefore, to issue any writ to perfect the right of a party to that which the law has given him; but if the court below is proceeding through mistake or otherwise, to execute its judgment or decree

notwithstanding the supersedeas, we may, under Sec. 716 Rev. Stat. issue an appropriate writ to restrain that action, for it would be 'a writ necessary for the exercise of our jurisdiction' ".

The principles of law set forth in the case of *Goddard vs. Ordway* have been followed by this court since that opinion was rendered in the year 1877, and at the present time those same principles of law are embodied in the Federal Rules of Civil Procedure promulgated by this court pursuant to the act of Congress of June 19, 1934, Ch. 651 (48 Stat. 1064) and are to be found in Rule 62 (a), (b), (d), (e), (f) and (g); Rule 73 (d), (e), and (f). The aforementioned rules have been incorporated by reference in Rule 14 of the General Rules of the United States Court of Appeals for the District of Columbia.

Therefore, in view of the aforementioned, it is contended that the United States Court of Appeals for the District of Columbia in denying to the appellant a supersedeas bond and a stay of the proceedings in the lower court pending the appeal, failed to give proper effect to an applicable decision of this court, and also failed to give proper effect to Rule 62 (d) and (g); Rule 73 (d) and (e) of the Federal Rules of Civil Procedure.

CONCLUSION

It is respectfully submitted, in the light of the foregoing, that the above petition for the issuance of a Writ of Certiorari to the United States Court of Appeals for the District of Columbia should be granted.

Respectfully submitted,

JAMES P. BURNS,

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Attorney for Petitioner

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 488.

MARGARET GATELY,

Petitioner,

v.

EDITH HARITON, ET AL.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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In The

Supreme Court of the United States

October Term, 1947.

No. 488.

Margaret Gately,

Petitioner,

v.

Edith Hariton, et al.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

STATEMENT OF FACTS.

The only issue before the District Court in this case was whether a certain leasehold interest was or was not an asset of the partnership. The District Court ruled that it was not a partnership asset, and directed the receiver not to sell or offer it for sale.

The partnership contract provided that in the event of a dissolution of the partnership the leasehold interest should

automatically vest in Jefferson L. Ford, Jr., and Edith Hariton. (See Article IV of Agreement, R. p. 16),

The lessee named in the lease was Jefferson L. Ford, Jr. (owner of the Lafayette Hotel), who, at the time of the execution and delivery of the lease, with the consent of the lessors, sublet the premises to the partnership, subject to the condition that it should revert in case of dissolution. The lease by its terms was not assignable.

Mr. David Hornstein, a witness produced on behalf of the intervenors, Jefferson L. Ford, Jr., and Edith Hariton, testified as follows:

> "As attorney for Mr. Ford, I negotiated for the lease of the premises in question. This lease was prepared by the attorneys for the owners, Mrs. Fannie M. Curtis and Jennie A. Murchison. I conferred with Mrs. Hariton, Mr. Parrish and Mr. Verkouteren, the latter representing appellant Margaret Gately. I was requested by Mr. Ford to include in the partnership agreement the provision above quoted. I drafted and prepared the partnership agreement. Mr. Ford and the other parties were made acquainted with the provision that the partnership would cease to have any interest in the lease in case of dissolution. (R. p. 53)
>
> "Appellant Mrs. Gately signed the partnership agreement after it had been prepared by me, and it was signed by the other two partners. I represented all of the partners to the agreement from the time of its inception. The owners of the land gave their consent to the assignment of the lease with the distinct understanding on their part that the partners had inserted the provisions aforesaid in their partnership agreement. No money was paid by any of the parties when they took over the restaurant business—they simply took the building on a lease arrangement, which included furniture, equipment and license then owned by the lessors. (R. p. 55)"

In ruling that the lease did not constitute a partnership asset the Court made no determination as to the ownership of the lease as between the lessors and the original lessee, since the decision of that question was not essential to a

determination of the only issue involved in this case, namely: whether the lease was a partnership asset to be sold by the receiver.

In answer to the intervening petition of Jefferson L. Ford, Jr., and Edith Hariton, claiming the lease pursuant to the terms of the partnership agreement, the petitioner, Margaret Gately, alleged: "that the parties to the partnership agreement did not at any time during the existence of the partnership abide by or adhere to the provisions of Article IV of said agreement, and that by reason of the aforementioned conduct on the part of the parties to said agreement the provisions of Article IV have been waived and cannot now be relied upon to vest title in said lease to Jefferson L. Ford, Jr., and Edith Hariton."

In said answer she set forth no facts from which an estoppel could arise, and upon the trial of the case no competent or material evidence was offered to sustain petitioner's present assertion of an estoppel. The Court so held in his Findings of Fact. (R. p. 109 to 112)

PART I.

(a) The judgment of the trial court was for a dissolution of the partnership; a reference to the Auditor of the Court to state the accounts thereof; and a direction to the receiver not to sell or offer to sell the lease in question. (R. p. 113)

Since the appeal was entirely without merit and was manifestly taken for the sole purpose of delay, the United States Court of Appeals for the District of Columbia committed no error in dismissing the appeal. The power of the Federal Appellate Courts to grant motions to affirm or dismiss frivolous appeals is well established.

Wagner Electric Manufacturing Co. v. Lyndon, 262 U. S. 226, 67 Law Ed. 961;
Roberts v. Wilkinson, 10 Fed. (2d) 311;
Dakin v. U. S., 105 Fed. (2d) 150;
McMillan v. Taylor, 81 U. S. Ct. of Appeals D. C. 249, 160 Fed. (2d) 217.

"To retain the case for oral argument under such circumstances would result in harmful delay and serve no useful purpose."

BODKIN v. EDWARDS, 266 U. S. 221, 65 Law Ed. 595.

(b) The Court made no determination as to the ownership of the lease and made no decision that would be binding upon the lessors with respect to the right to assign the lease. At no time did the petitioner make any effort to bring the lessors into court as parties in interest and no question as to alleged absence of necessary parties was referred to in any pleadings filed by the petitioner. (See Findings of Fact and Conclusions of Law, R, p. 109 to 112.)

(c) No competent evidence was excluded. The letter of Grattis H. Parrish, (referred to on page 8 of the present petition,) was excluded because it was immaterial and irrelevant to the only issue in the case. The statement in the petition that Parrish was Ford's agent is without support in the evidence.

PART II.

Petitioner noted her appeal from the judgment of the District Court on February 20, 1947, and docketed her appeal on April 30, 1947. During the intervening period no application was made to the trial court for a stay of proceedings, as would have been authorized by Rule 62 (a) Federal Rules of Civil Procedure; nor did petitioner make any effort in the trial court to furnish a supersedeas bond under the provisions of Rule 73 (d).

No application for a stay of proceedings was made until May 10, 1947. On May 17, 1947 respondents filed their motion to dismiss the appeal. On June 24, 1947, this motion was granted and at the same time and as a part of the same order the application for stay was denied. The granting of the motion to stay rested in the discretion of the Court and that discretion was exercised against petitioner after the Court had examined the record and had concluded to dismiss the appeal because it was frivolous.

There was no appeal from the judgment dissolving the partnership and appointing a receiver. (R. p. 117) That part of the judgment to which complaint is made is paragraph 5, which provided that the receiver should not sell the leasehold interest. (R. p. 114) This portion of the judgment being negative in form, there was no need to stay the same, as nothing could be gained by a stay of the judgment.

It is respectfully submitted that there has been no failure on the part of the U. S. Court of Appeals to give proper effect to any decision of this Court, or to any of the Federal Rules of Civil Procedure.

WHEREFORE, respondents respectfully pray that the petition for Writ of Certiorari should be denied.

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